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CHARLES

Supreme Court of the United States

OCTOBER TERM, 1942

NO. 495

G. E. BURFORD, ET AL.,
Petitioners,

v.

SUN OIL COMPANY, ET AL.

NO. 496

SUN OIL COMPANY, ET AL.,
Cross-Petitioners,

v.

G. E. BURFORD, ET AL.

SUPPLEMENTAL ARGUMENT OF SUN OIL COMPANY AND MAGNOLIA PETROLEUM COMPANY REPLYING TO QUESTIONS SUBMITTED BY THE COURT

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For clarity G. E. Burford and those aligned with him are herein called "petitioners" and Sun Oil Company and Magnolia Petroleum Company are called "cross-petitioners."

This supplemental argument is limited to the questions propounded by the Court.

> 1 (a). *Is the court proceeding provided by Texas law for judicial examination of the orders of the commission a "case or controversy" within the meaning of Article III of the United States Constitution?*

This question should be answered in the affirmative.

From the questions submitted for reargument, it is assumed that this Court is satisfied that under the record the trial court had jurisdiction of this suit in so far as jurisdiction is grounded on diversity of citizenship and a claimed violation of rights under the Fourteenth Amendment to the Constitution of the United States.

The amended well spacing rule under which the orders in controversy were granted (R. 132) provides that exceptions will be granted to permit drilling within shorter distances than those therein specified when necessary either to prevent waste or to prevent confiscation of property. The orders in controversy were granted solely to prevent confiscation of the permittee's property (R. 30, 32, 153, 155), and this suit does not involve, nor do petitioners claim, any hypothesis of possible necessity to prevent waste. *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, 83-4, paragraphs 30, 31, 37; *Spear* v. *Humble Oil & Refining Co.*, (Civ. App.) 139 S. W. (2d) 212.

In the *Gulf Land Company case* (134 Tex. at pp. 70-71, 131 S. W. (2d) at p. 80) the court said:

> " . . . the term 'confiscation' evidently has reference to depriving the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind."

The State courts have held that it is mandatory upon the Railroad Commission, rather than discretionary, to grant permits under the "confiscation" exception clause when necessary for that purpose. *Dailey* v. *Railroad Commission*, (Civ. App.) 133 S. W. (2d) 219, 221 (writ refused, which under the provisions of Art. 1728, Vernon's Annotated Civil Statutes, constituted approval by the Supreme Court of Texas of the principles of law declared in the opinion.) The Railroad Commission is bound by its rule and can grant a permt to prevent the confiscation of property only if the well is, in fact, necessary to prevent such confiscation. *Railroad Commission* v. *Gulf Production Co.*, 134 Tex. 122, 125-126, 132 S.W. (2d) 254, 255; *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80.

In entering an exception order of the type here involved, the Railroad Commission acts in a "quasi-judicial" capacity rather than a legislative or policy making capacity. *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, 81, paragraph 15; *Railroad Commission* v. *Shell Oil Co.*, (Civ. App.) 154 S. W. (2d) 507, 511, paragraph

7, affirmed by Supreme Court, 161 S. W. (2d) 1022; *Magnolia Petroleum Co.* v. *Railroad Commission*, 128 Tex. 189, 194, 96 S. W. (2d) 273, 275.

Art. 6049c, Sec. 8, Vernon's Texas Civil Statutes, 1936,[1] gives anyone who is interested and affected by an order of the Commission the right to file "a suit" in a court of competent jurisdiction in Travis County, Texas, to test the validity of such order, places the burden of proof on the complainant, and declares the order prima facie valid.

In such suit "the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency, there existed sufficient facts to justify the same." *Railroad Commission* v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, 1030; *Letwin* v. *Gulf Oil Corporation*, 164 S. W. (2d) 234, 235, paragraph 1 (writ refused).

The transcript of evidence, if any, introduced

[1]This statute reads as follows:

"Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation, or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission or the members thereof, as defendants, to test the validity of such laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid.

at the hearing before the Railroad Commission is not admissible on the merits of the issues on the trial;[2] the trial is *de novo* on evidence independently adduced, as in ordinary cases.[3]

On the trial of such suit the court does not deal with hypothetical or future possibilities. The determination is based on the facts existing at the time the order was entered.[4]

The question whether the Railroad Commission can lawfully grant or lawfully refuse a permit under the "confiscation" exception clause depends upon questions of fact and of law, and the judgment entered involves a final judicial determination of the question whether the applicant has the property right to produce valuable oil from his land or whether his property rights in that respect are protected by existing wells, and the determination of the right of owners of adjacent land to prevent drainage of oil from their own property. *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 70,

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[2]Cook Drilling Co. v. Gulf Oil Corp., 139 Tex. 80, 161 S. W. (2d) 1035; Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 104 S. W. (2d) 1106, 1111; Empire Gas & Fuel Co. v. Railroad Commission, (Civ. App.) 94 S. W. (2d) 1240 (writ refused); Railroad Commission v. Shell Oil Company, 139 Tex. 66, 161 S. W. (2d) 1022, 1030.

[3]Cook Drilling Co. v. Gulf Oil Corp., 139 Tex. 80, 161 S. W. (2d) 1035; Railroad Commission v. Shell Oil Company, 139 Tex. 66, 161 S. W. (2d) 1022, 1028, 1029, 1030; Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 104 S. W. (2d) 1106.

[4]Railroad Commission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S. W. (2d) 967, 970; Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. (2d) 73, 82, at end of paragraph 25; Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 104 S. W. (2d) 1106, 1111, at end of paragraph 6.

131 S. W. (2d) 73, 80, defining "confiscation" in paragraphs 9-12; *Railroad Commission* v. *Gulf Production Co.*, 134 Tex. 122, 125-6, 132 S. W. (2d) 254; *Railroad Commission* v. *Shell Oil Company*, (Civ. App.) 154 S. W. (2d) 507, 509, paragraph 1, affirmed 161 S. W. (2d) 1022, holding "It is now settled that the question of confiscation involves primarily the private property rights of adjacent lease holders. . . . " This is demonstrated by the fact that Burford, et al., contend the wells in controversy are necessary to prevent consfication of their property, whereas cross-petitioners contend they are not necessary for that purpose, but will enable petitioners to take and drain large quantities of cross-petitioners' oil. Furthermore, under the State law the judgment entered by the court in such a case is final and binding until there has occurred a change of conditions from which new and different rights arise. *Magnolia Petroleum Co.* v. *New Process Production Co.*, 129 Tex. 617, 104 S. W. (2d) 1106, 1111, paragraph 6; *Railroad Commission* v. *Humble Oil & Refining Co.*, (Civ. App.) 119 S. W. (2d) 728, 729 (writ refused).

The court proceeding contemplated by the statute in entirely judicial in its nature. It contemplates a hearing of testimony, the findings of facts, the entry of a judgment, and the issuance of process to enforce the judgment. It is not a proceeding in which the court will or may determine the wisdom of the Commission action, but one in which the court will determine only the power and authority of the Commission under the facts to take the action

in question. The proceeding in the court is not legislative in character like that involved in *Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210, 29 S. Ct. 67.

On the trial of this case, the questions before the court for determination were (1) whether the orders in controversy were entered in violation of the State conservation statutes and rules and (2) whether the action of the Commission was, under the facts, discriminatory and confiscatory, violating cross-petitioners' rights under the Fourteenth Amendment; and cancellation of the permit orders and ancillary injunctive relief was sought.

We submit there can be no doubt that the suit at bar involves a "case or controversy" within the meaning of Article III of the United States Constitution. The decisions heretofore rendered by this Court are conclusive to this effect. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 236, 57 S. Ct. 461; *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 259, 53 S. Ct. 345; *Gaines* v. *Fuentes*, 92 U. S. 10, 17.

Paraphrasing the language of this Court in the Wallace case, delivered by the present Chief Justice, this suit is an adversary proceeding between parties seeking a final determination of their legal rights; valuable legal rights of parties on each side of the case will be directly affected to a specific and substantial degree by the decision of the issues herein; the questions involved are such as lend themselves to judicial determination and are neither legislative

nor administrative questions; the adjudication of the issues will be final, not advisory or subject to revision by a more authoritative agency; and no abstract determination based on a hypothetical state of facts is involved.

The Reply Brief for G. E. Burford, et al., states, p. 8, "federal jurisdiction is not denied."

> 1 (b) *Assuming it (the court proceeding provided by Texas law for judicial examination of orders of the Commission) involves a case or controversy, does it also involve the determination of state governmental policy committed by state statutes to the state administrative process?*

This question should be answered in the negative.

The statute referred to, Art. 6049c, Sec. 8, gives interested and affected parties the right to file suit to test the validity of *any* order of the Commission, whether it be legislative or policy making in character, such as the spacing rule, or quasi-judicial, such as an order granting an exception to the spacing rule, the right to which exception is dependent entirely upon whether there existed sufficient facts to justify granting the exception under the language of the exception clause in the rule.

As we are not here concerned with legislative orders, we confine our discussion to those which are quasi-judicial. In determining the validity of such an order the court does not substitute its judgment

on any question of governmental policy. All questions of state governmental policy with regard to the circumstances under which exceptions to Rule 37 may be granted by the Railroad Commission were settled by the adoption of that rule, and the specific terms of the rule. In determining the validity of an order granting an exception thereunder the question is simply whether, under the facts, the exception is authorized by the rule.

In the case at bar, involving as it does a quasi-judicial order, the spacing rule, as uniformly construed by the courts of Texas, provides that the Railroad Commission can legally grant an exception to prevent confiscation on land which, under the rule, is entitled to development as a separate tract, if, and only if, the well is in fact necessary to prevent uncompensated drainage of oil from the tract. *Railroad Commission* v. *Gulf Production Co.*, 134 Tex. 122, 125-126, 132 S. W. (2d) 254, 255; *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80; *Railroad Commission* v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, 1025.

The fact that the court trying a suit to test the validity of a Rule 37 permit order is not called upon to determine any matter of state governmental policy is clearly shown by the Shell case just cited, which held that Rule 37 *would be void if it did not set forth a "guide or standard to govern such officials in distinguishing between individuals entitled to such permits or licenses and those not so entitled."* This case also made it clear that in testing the validity of such

an order granting an exception the court is not dealing with a question of administrative discretion, but that the validity of such an order depends on existence of facts showing a right to an exception under one of the exception clauses of the spacing rule.

The case at bar does not involve any contention that the wells are necessary to prevent waste. It merely involves the validity of four wells out of about twenty-five thousand in the East Texas field, and seeks adjudication of the private property rights of the parties.

> 1 (c). *Does Article* 6049(c), *Sec.* 8, *of the Texas Civil Statutes, in providing that review of the commission's order shall be in "a court of competent jurisdiction in Travis County, Texas, and not elsewhere," confine that review to a state court in Travis County?*

This question should be answered in the negative.

In *Reagan* v. *Farmers' Loan & Trust Company*, 154 U. S. 362, 391, 14 S. Ct. 1047, this Court answered this question in the negative as applied to a similarly worded Texas statute authorizing filing of suits "in a court of competent jurisdiction in Travis County, Texas," to cancel orders of the Railroad Commission in railroad matters,[5] and held:

"Nor can it be said in such a case that relief

[5]Acts, 22nd Leg., R. S. p. 55; 10 Gammel's Laws of Texas, 57; now Art. 6453, Ver. Tex. Civ. Stats., 1936.

is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts. Cowles v. Mercer Co., 7 Wall. 118; Lincoln Co. v. Luning, 133 U. S. 529, 10 Sup. Ct. 363; Chicot Co. v. Sherwood, 148 U. S. 529, 13 Sup. Ct. 695.

"We need not, however, rest on the general powers of a federal court in this respect; for, in the act before us, express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit. Section 3 provides that any dissatisfied 'railroad company, or other party at interest, may file a petition' 'in a court of competent jurisdiction in Travis County, Texas, against said commission as defendant.' The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis county, but in Travis county. The language, differing from that which ordinarily would be used to describe a court of the state, was selected, apparently, in order to avoid the objection of an attempt to prevent the jurisdiction of the federal courts. The circuit court for the western district of Texas is 'a court of competent jurisdiction in Travis coun-

> ty.' Not only is Travis county within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held. 23 Stat. 35. It comes, therefore, within the very terms of the act."

To the same effect are *Railroad Commission of La.* v. *Cumberland T. & T. Co.*, 212 U. S. 414, 420, 29 S. Ct. 357, 360; *McMillan* v. *R. R. Com.*, 51 F. (2d) 400; *Gulf Land Co.* v. *Atlantic Refining Co.*, 113 F. (2d) 902; *Stanolind Co.* v. *Ambrose*, 118 F. (2d) 847; *Platt* v. *Lecocq*, 158 F. 723, 85 C.C.A. 621, 15 L.R.A.N.S. 558; *Landon* v. *Kansas Public Utilities Comm.*, 234 F. 152 (reversed on other grounds, 249 U. S. 236, 39 S. Ct. 268, 63 L. Ed. 577); *Texas & P. R. Co.* v. *Humble*, 181 U. S. 57, 21 S. Ct. 526, 45 L. Ed. 747; 25 *C. J.* 701, Sec. 15.

The Texas Workmen's Compensation Act, Art. 8307, Sec. 5, Vernon's Texas Civil Statutes, gives any interested party the right to "bring suit in the county where the injury occurred" to set aside decision of a compensation claim by the Industrial Accident Board, and this provision is jurisdictional (*Oilmen's Reciprocal Ass'n.* v. *Franklin*, 116 Tex. 59, 286 S. W. 195; *Mingus* v. *Wadley*, 115 Tex. 551, 285 S. W. 1084); but it has been held that such a suit is within the jurisdiction of the federal district court of the district which includes the county of injury, when diversity of citizenship and the requisite jurisdictional amount exist. *Ellis* v. *Associated Industries Ins. Corp.*, (CCA 5) 24 F. (2d) 809, 810, certiorari denied, 278 U. S. 649. This is entirely analogous to the question at bar.

Since the appeal statute involved in the case at bar was originally enacted in 1931 and later amended in 1935 (Acts 1931, 1st C. S., p. 46; Acts 1935, R. S., p. 180) long after the decision in *Reagan* v. *Farmers' Loan & Trust Co.*, supra, held that a similarly worded Texas statute conferred jurisdiction on the Federal Court in Travis County, as well as on the state courts, it must be assumed that the Legislature enacted these statutes in the light of this decision and intended that this special appeal might be entertained by the federal as well as by a state court in Travis County. *Arrowood* v. *Blount*, 121 Tex. 52, 41 S. W. (2d) 412, 414; *Stephens County* v. *Hefner*, 118 Tex. 397.

2. *Are there grounds similar to those existing in Railroad Commission* v. *Pullman Co.*, 312 *U. S.* 496, *which make it appropriate for the district court in its discretion to withhold the exercise of its equity jurisdiction?*

This question should be answered in the negative.

The Pullman case involved the construction of a state statute which had not been construed by the courts of the state and rights under the Federal Constitution, but the court could avoid determination of the latter question if plaintiff was entitled to judgment on the question of state law. To avoid making a "forecast" or "tentative answer which may be displaced tomorrow" on the question of state law, this Court remanded the case with directions to the trial court to retain the bill pending determina-

tion of this state law question by proceedings in the state courts.

No such situation exists in the case at bar. The first four points presented in cross-petitioners' brief involve questions of substantive law established by repeated decisions of the state courts on which cross-petitioners are entitled to judgment. The Texas law applicable to the undisputed evidence in this case on all of these first four grounds has been definitely and clearly established by the decisions cited in the brief and typewritten memorandum heretofore filed, and no useful purpose would be served by repeating the authorities here. Likewise, no purpose of comity or "judicious self-restraint" would be served by a refusal of this Court to act now on those four points. A decision for cross-petitioners on any one of those first four issues would require rendition of a judgment in their favor, and thus dispose of this case. Each of those questions involve purely matters of law based on undisputed evidence in the record. Only in the event that this Court holds against cross-petitioners on all four of these issues, either by holding that the State law is contrary to our statement of it or that the issues are not established by undisputed evidence, is it necessary to remand the case for further development of the issues of state law or to determine the constitutional questions raised.

Only in the event of a remand is it necessary for the court to go into the question of the scope of judicial review laid down by the state courts in proceedings under Art. 6049c, Sec. 8. This necessarily fol-

lows if, as we contend, the facts establishing the first four issues in cross-petitioners' brief are undisputed, since undisputed evidence presents merely a question of law, which concededly is within the province of the judiciary. But, in our view, the state law is clearly and finally established, even on the question of scope of judicial review in the event of a remand, by the decisions of the Texas Supreme Court in *Railroad Commission* v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, and *Cook Drilling Company* v. *Gulf Oil Corporation*, 139 Tex. 80, 161 S. W. (2d) 1035, which were simultaneously announced by the court, and are discussed together on pp. 63-72 of cross-petitioners' brief.

We submit that this case is entirely dissimilar to the situation in the Pullman case.

We further suggest that the rule announced in the Pullman Company case should not be extended to cover cases not clearly falling within its terms. It is of the utmost importance to litigants and courts that the jurisdiction that can and will be exercised by a court be definitely and clearly ascertainable before a suit is filed. If a case of which the federal courts clearly have jurisdiction is filed and finally reaches this Court and is then remanded, as was the Pullman case, with instructions that it be held on the docket pending litigation of the state law questions in the state courts, and must then be tried again in the federal court, the litigants and the courts will be subjected to excessive expense and delay—resulting

in impairment, if not practical loss, of the right to resort to the United States Courts.

If the state court, pursuant to such an order, proceeds to decide the questions arising under the United States Constitution and laws as well as those arising under state laws (and parties would doubtless feel constrained to present all such issues in one suit, in view of the well established principle of state law that a judgment of a state court shall be "conclusive not only as to the subject matter determined, but also as to every other matter which the parties might have had decided": *Cain* v. *Balcom*, 130 Tex. 497, 109 S. W. (2d) 1044, 1046; *Shell Petroleum Corp.* v. *Railroad Commission*, 86 S.W. (2d) 57, 59; *Ames* v. *Herrington*, 139 S. W. (2d) 183, 190; *Trigg* v. *Whittenburg*, 129 S. W. (2d) 472, 474), the decision of the State court will be *res judicata* and the right to resort to the federal trial court will be lost and the litigants will be confined to their remedies in the appellate courts, state and federal.

Even if the state courts decide only state law questions and effectively leave the federal questions for decision by the United States courts, still the findings of fact relevant thereto that are made in the state court will be binding by estoppel when the federal questions are submitted to a federal court. *Houston Terminal Land Co.* v. *Westergreen*, 119 Tex. 204, 27 S. W. (2d) 526.

In this connection we call attention to the fact that the plaintiff in a case against a citizen of another

state can file his suit in the state court, but that the defendant has the unconditional right to remove it to the federal court. Thus a plaintiff who thinks his case may come within the rule laid down in the Pullman case and who decides that he would rather try it in the state court than to run the risk of litigating it through the federal trial and appellate courts, and then have it referred in part to the state courts, would not be able to make a real choice.

We further suggest that the question as to whether state court decisions, no matter how numerous and consistent, have settled the law governing a particular set of facts is often a difficult one. The numerous instances in which the plaintiff and defendant each cite the same case as authority for opposing contentions should, we submit, preclude the adoption, and certainly the extension, of any rule which makes the exercise of the federal court's undoubted jurisdiction depend upon the question as to whether the applicable state law has been settled by the state courts. The possibility of the rendition of opinions by state courts pending the appeal in the federal court is also fruitful of difficulty. Such a rule must always work to the advantage of the defendant and to the prejudice of the plaintiff.

3. *In view of the recent decisions of the Texas courts, are there grounds similar to those existing in Railroad Comm'n. v. Rowan & Nichols Oil Co.*, 311 U. S. 614, 615, *which make it appropriate for the district court to decline jurisdiction of the cause?*

This question should be answered in the negative.

We understand that this question relates only to the paragraph which was added to the opinion in *Railroad Commission* v. *Rowan & Nichols Oil Company* by the order on petition for rehearing set forth in 311 U. S. 614, 61 S. Ct. 66. This paragraph states that it is not clear as to whether the Texas decisions permit the local courts to exercise an independent judgment on what is reasonable; in other words, that the applicable law as to the *scope of judicial review* of the kind of order there involved had not then been settled by the state courts. As to this, we refer to the preceding discussion of question number two and *Railroad Commission* v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, and *Cook Drilling Company* v. *Gulf Oil Corp.*, 139 Tex. 80, 161 S. W. (2d) 1035, decided subsequently to the decision in the Rowan & Nichols case, both of which are hereinabove discussed.

It is readily apparent that question three is material only in the event of a remand and does not arise if cross-petitioners are entitled to judgment on any one of the first four points of their brief, all of which present questions of law arising on undisputed facts. With this appraisal of its position in the case, we will now discuss question three.

The court inquires whether recent decisions of the Texas courts present grounds similar to those existing in the Rowan & Nichols case. We presume the court refers to *Railroad Commission of Texas* v.

Wencker, 168 S.W. (2d) 625 (decided by the Supreme Court of Texas on February 10, 1943, but not yet officially reported) as that is the only recent decision that has been cited in this connection by petitioners.

In a memorandum filed with the court after the original argument petitioners insisted that the opinion in the Wencker case "conclusively demonstrates * * * that the Texas law on the scope of judicial review of Rule 37 orders is so uncertain that the federal courts should not assume the burden of passing on the validity of such orders under the Texas law." This contention is based on the following paragraph of the opinion in the Wencker case:

> "The statutes authorize the Railroad Commission to handle the details relating to the production of oil and gas in the State. Article 6004 et seq., Vernon's Annotated Civil Statutes. The Railroad Commission has exclusive original jurisdiction to determine the matter of changed conditions in granting permits to drill wells, *subject to the right of appeal to the courts*. Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 101 S. W. (2d) 1106; Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. (2d) 296, 83 S. W. (2d) 935, 99 A.L.R. 1107. The Railroad Commission is given the power to determine *primarily all issues*, that is, all issues that are not established as a matter of law; and to permit the courts to pass upon a question not passed on by the Commission would violate such power. Gulf Land Co. v. Atlantic Refining Co., supra; Brown v. Humble Oil & Refining Co., supra." (Emphasis ours.)

Petitioners have insisted first, that the language of this paragraph is inconsistent with the statement in *Railroad Commission* v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, 1029, that "the doctrine that the administrative agency should take the testimony and make the findings of fact, and that the findings should be binding upon the court, is foreign to the law of this State."

Petitioners' attorneys have evidently overlooked the statement in the third sentence of the quotation from the Wencker case to the effect that the decision of the Railroad Commission as to changed conditions is "*subject to the right of appeal to the courts.*" We also call attention to the fact that the concluding sentence of the quoted paragraph states that the power of the Railroad Commission is to "determine primarily all fact issues," which is a far different thing from a determination that is binding on the courts, and that this sentence concludes with a definite indication that the courts can pass upon any question that has been passed on by the Commission, but not on a question that has not been passed on by it.

This latter pronouncement is entirely consistent with the law announced in *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, 84, to the effect that a disputed issue of fact that has not been passed on by the Commission cannot be decided by the courts and made the basis of a judgment sustaining the permit; in other words, that a permit cannot be upheld on a ground of exception other than

the one on which the Commission granted the permit, unless the right to the permit on such other ground is shown on the trial as a matter of law. *Stanolind Oil & Gas Co.* v. *Midas Oil Co.*, 143 S. W. (2d) 138 (writ refused); *Shell Petroleum Corp.* v. *Railroad Commission*, 133 S. W. (2d) 194; *Humble Oil & Refining Co.* v. *Potter*, 143 S. W. (2d) 135.

Petitioners also insist that the Supreme Court in the Shell case (139 Tex. 66, 161 S. W. (2d) 1022) held that the Texas statutes do not authorize the making of any findings of fact by the administrative agency, but that the same court in the Wencker case examined the record to determine what findings were made by the Commission. The sentence in the Shell case referred to by petitioners was undoubtedly intended as a holding that the laws of Texas do not provide for the filing by the Railroad Commission of *written* findings of fact. This is evident because in the last portion of the second paragraph, 161 S. W. (2d) at 1029, the court refers to the question as to whether the administrative agency "came to the proper fact conclusion." The opinions of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, *Cook Drilling Co.* v. *Gulf Oil Corp.*, 139 Tex. 80, 161 S. W. (2d) 1035, and the opinion of the Court of Civil Appeals in *Stanolind Oil & Gas Co.* v. *Midas Oil Co.*, 143 S. W. (2d) 138 (writ refused, and holdings consequently approved), *Shell Petroleum Corp.* v. *Railroad Commission*, 133 S. W. (2d) 194, 196, and *Humble Oil & Refining Co.* v. *Potter*, 143 S. W. (2d) 135, 137, clearly show that the rule is well

established that the Railroad Commission has original jurisdiction to consider and decide all issues of fact presented by the evidence at a hearing on an application for exception to Rule 37; but the opinion of the Supreme Court in the above mentioned Shell and Cook cases, and the subsequent opinion of the Court of Civil Appeals in *Letwin* v. *Gulf Oil Corp.*, 164 S.W. (2d) 234 (writ refused), also clearly show that the Commission's findings of fact are not required to be written and are not binding on the courts in a suit to test validity of an order granting a permit, in that the courts try such a case *de novo* and make their independent determination of all issues of fact and law.

Burford, et al, also insist that the opinion in the Shell case, 161 S. W. (2d) 1022, is inconsistent with that in the Wencker case, because of a statement in the former that the record before the Railroad Commission is not admissible as evidence *per se* in the trial court (161 S. W. (2d) at 1030), whereas the same court in the Wencker case examined the record before the Railroad Commission to determine what questions had been presented to it and what findings had been made. But the holding in the Shell case that "the evidence heard by the agency is not *per se* admissible upon the trial in the District Court" (i. e., not admissible as original evidence to establish the existence of facts as testified to by witnesses at the Commission hearing) and the further statement in the Shell case that the question as to whether the record of the Commission hearing is

admissible on the trial in the District Court "must depend upon its own merits under the general rules of evidence" (161 S. W. (2d) at 1030) are entirely consistent with the holding in the Wencker case. In the Wencker case, the record before the Commission was not offered as evidence *per se* on the right to a permit. The controlling question in the Wencker case was whether, in granting Wencker a permit for No. 2 during the pendency of a suit, on the first appeal of which it was decided that he had a right to one well as a matter of law, the Commission had intended to grant the permit as a first well or as a second well. The Commission contended that it had granted the well as a first well, hence that Wencker suit, when it came on for a second trial, had become moot. The court examined the record before the Commission solely for the purpose of determining what the Commission had passed on, and on deciding that the Commission had granted No. 2 with the intention that it be the first well, held the suit to be moot. Under the particular facts of the Wencker case, the record before the Commission was the best evidence of what the Commission had passed on. The court considered it solely for this special purpose. Clearly the examination of the record by the court in the Wencker case for a *special purpose* was not in the slightest degree inconsistent with any part of the opinion in the Shell case.

The Wencker case did not discuss the scope of judicial review, and does not undertake to change

the rule on that subject announced in *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 161 S. W. (2d) 1022, and *Cook Drilling Co.* v. *Gulf Oil Corp.*, 139 Tex. 80, 161 S. W. (2d) 1035. The Wencker case could not have involved the scope of judicial review in determining the validity of an order of the Commission, because the court held the case moot and did not undertake to decide the merits.

We also suggest that even if there be inconsistency between one opinion of the Supreme Court and another subsequently rendered, it does not have the effect of rendering the law uncertain, but merely impliedly overrules the inconsistent portion of the earlier opinion. Furthermore, the evidence in the case at bar is such that the alleged uncertainty, even if it existed, would still leave enough clearly established Texas law to finally decide this case on any one of several grounds.

The insistence that the microscopic differences between the words used in the opinion in the Wencker case and in the Shell case show that the law is unsettled is the best possible evidence that the order made in Railroad Commission v. *Pullman Company*, 312 *U. S.* 496, *if held applicable to cases such as this, will result in the surrender by the federal courts to the state courts of a large part of their jurisdiction.*

We submit that it will be impossible to find many cases, if any, in which the material issues of fact are more clearly established by the undisputed evi-

dence and in which the governing principles of state law have been more clearly settled.

Respectfully submitted,

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ACKNOWLEDGEMENT OF SERVICE

Service of the foregoing Supplemental Argument is acknowledged, this day of April, 1943.

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